STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2003
v	No. 237764 Cheboygan Circuit Court
HARRY GROVER COPELAND, JR., Defendant-Appellant.	LC No. 00-002339-FH

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Defendant appeals by right his conviction after a jury trial of second-degree child abuse. MCL 750.136b(3).[1] The trial court sentenced defendant as a second offender MCL 769.10 to 20 to 72 months in prison. We affirm.

I. FACTS

This case arises from a spiral fracture of the tibia sustained by defendant's daughter, two-year-old Tiffany Copeland, on March 3, 1999. Defendant's wife (and Tiffany's mother) Michelle Copeland testified that on March 2, 1999 Tiffany fell down a flight of stairs and bruised her face. Michelle took Tiffany to the emergency room for treatment of her facial injuries, but did not notice any injury to Tiffany's leg.

Michelle testified that the next day she was preparing to visit a cousin and requested that defendant put Tiffany's coat on for her. Michelle went in to the bathroom to change another daughter's diaper. When she returned, she noticed that Tiffany's leg was swollen between the knee and ankle and that she stumbled when she tried to walk. Michelle asked defendant what had happened and he stated that he did not know.

Mary Jewell, defendant's mother and Tiffany's grandmother testified that she arrived at defendant's home shortly after Michelle noticed Tiffany's leg injury. She noticed that Tiffany's leg had a lump on it. She also overheard Michelle ask defendant what he had done. Defendant replied that he had done nothing. Michelle decided to take Tiffany to the emergency room and Jewell recommended that Michelle tell doctors that Tiffany had hurt herself in the bathroom.

[1] Presently MCL 750.136b(3)(a).

When Michelle arrived in the emergency room, she told doctors that Tiffany injured herself when she was jumping on the bed and fell off onto some toys. Michelle admitted that this was a lie but stated that she did not believe that defendant had intentionally injured Tiffany. Dr. William Borgerding treated Tiffany in the emergency room on March 3, 1999 and diagnosed her with a spiral fracture of the tibia. He stated that such an injury is generally caused by the application of a significant amount of torque to the leg. Dr. Ronald Weisberger testified that he examined Tiffany on March 2, 1999 for injuries to her head and saw nothing that would indicate a broken leg. Dr. Borgerding testified that following a spiral fracture a victim would experience immediate symptoms and would be unable to walk.

Dr. Vincent Palusci testified at trial as an expert witness for the prosecution in the area of child abuse and neglect. Dr. Palusci examined Tiffany's hospital records and concluded that her injury did not result from a typical accident in childhood play. He stated that a spiral fracture of the tibia requires some twisting or rotation and a significant amount of force. His ultimate diagnosis was that the fracture was the result of physical abuse that occurred sometime after Tiffany's visit to the hospital on March 2, 1999 for head injuries.

Testimony during the trial of Michelle, Jewell and defendant revealed that previously Michelle and defendant had a four-week-old son whom the State of Tennessee removed from their custody after defendant broke the infant's leg. This son also had bite marks on his face upon arrival at the emergency room. Another daughter was removed from their custody after she was taken to the emergency room with skull fractures and neither parent was able to offer an adequate explanation as to the cause of the injuries.

Defendant testified that he is 6'4'' tall and weighed 350 pounds at the time his daughter was injured. He stated that he had problems with his temper but that he had been in counseling and resolved those issues successfully. At trial, he stated that he did not know how Tiffany's leg had been broken. He denied twisting her leg or slamming her down. He asserted that her leg had broken on March 2, 1999 when she fell down the stairs. On March 3, 1999, he was attempting to put Tiffany's coat on and she kept pulling her arm out and flopping to the floor. He picked her up and set her down, but she flopped over again and started crying and saying that her leg hurt.

Officer Joseph Derry testified that he interviewed defendant at the hospital on March 4, 1999. At that time defendant told him that Tiffany had hurt herself by falling off the bed on to some toys. Later that day, defendant provided Derry with an oral statement wherein he stated that he attempted to put Tiffany's coat on but she went limp and fell to the floor. He then picked her up and set her down hard and that is when the injury occurred. Tiffany then started crying and saying her leg hurt. Defendant stated that it was an accident and he did not intend to hurt her.

Defendant initially pleaded no contest to attempted first-degree child abuse. However, on May 17, 2001 he filed motions to withdraw his plea, vacate his previous waiver of jury trial and replace his appointed counsel.[2] On May 22, 2001, the trial judge granted the motions to

[2] This was defendant's second appointed counsel. He had previously pleaded to a reduced charge while represented by his first counsel and then successfully moved to withdraw that plea
(continued…)

withdraw his plea and vacate his waiver of jury trial but denied his motion to replace defense counsel. The trial proceeded and at the close of testimony, the trial court instructed the jury on first-degree child abuse. The trial court also granted defendant's request to instruct the jury on second-degree child abuse. The court read the standard jury instruction for second-degree child abuse, CJI2d 17.20, which states that the jury must find that defendant "did some reckless act." Defendant did not object to the instructions as given. The jury then found defendant guilty of second-degree child abuse.

II. STANDARDS OF REVIEW

The substitution of appointed counsel is within the sound discretion of the trial court. *People v Arquette,* 202 Mich App 227, 231; 507 NW2d 824 (1993).

Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29, *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130, (1999). Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Torres (On Remand),* 222 Mich App 411, 423; 564 NW2d 149 (1997).

III. ANALYSIS

A. Denial of Substitute Counsel

Defendant argues that the trial court abused its discretion when it denied his motion to have new defense counsel appointed. We disagree.

Defendant's motion stated that he was "not comfortable with current counsel, being of the opinion that counsel is not convinced of his innocence, and so will not provide an aggressive defense." Defendant argues on appeal that he did not feel that it was his decision to enter a plea of no contest. He and the trial court engaged in the following discussion regarding his motion to replace his appointed counsel:

> *DEFENDANT* No, I don't feel it was my decision to enter the plea.
>
> *TRIAL COURT* But you told me it was under oath. Now, which way is it?
>
> *DEFENDANT* I told – yes, I told you it was. I told you it was because my – I don't even know how to go through and explain it to you.
>
> *TRIAL COURT* Try just telling the – honestly what occurred and that's probably the easiest place to begin.
>
> *DEFENDANT* That's what I'm trying to do. What occurred was the fact that my – frankly, my attorney didn't want to continue the trial with it so I ended up going with the plea bargain.

(…continued)

as well.

TRIAL COURT He told you you had to plead guilty? He didn't want to do the trial?

DEFENDANT No, He's not saying I had to plead guilty. He was strongly urging the fact that I pled to this plea bargain even though I argued with him on the fact I did not want to do it.

TRIAL COURT Didn't I ask you if it was your own decision to enter the no contest plea and you told me, "yes, it was, Judge," didn't you?

DEFENDANT I'm not even – yeah, I did. I'm not even sure until you said enter a plea of guilty. I didn't understand what a no contest plea meant.

TRIAL COURT Why did you keep continuing through with the plea? I explained it to you clearly, didn't I? Yes or no?

DEFENDANT Honestly I don't remember everything you did say that day.

TRIAL COURT Didn't you tell me you understood it?

DEFENDANT Yeah, I believe so. I mean I understand what my attorney tells me and I understand if my attorney says yes I sit there and say yes. If my attorney said no, I said no. That's what I understand.

TRIAL COURT So it's your attorney's fault that you went through the entire plea? You were just repeating what the lower [sic] said? You weren't giving me any truthful answers? Is that what you're saying Mr. Copeland?

DEFENDANT I'm not saying – I wasn't lying, no.

TRIAL COURT What are you saying?

DEFENDANT What I'm trying to say is the fact that this was not something that I wanted to go along with.

TRIAL COURT Why did you tell me it was?

DEFENDANT Because that's what my attorney recommended and he is who the court appointed to me. At the time I couldn't go – afford to go out and hire my own attorney. I guess if I would of, it would have been different.

The trial court then questioned defendant's attorney about this matter and the attorney stated that there had been good communication between himself and defendant. Furthermore, the attorney stated that he had told defendant that he was willing to "pursue his case as he might direct within the bounds of the law."

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of

good cause and where substitution will not unreasonably disrupt the judicial process. *People v Ginther*, 390 Mich 436, 441, 212 NW2d 922 (1973); *People v Jones*, 168 Mich App 191, 194, 423 NW2d 614 (1988). Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *People v Charles O Williams*, 386 Mich 565, 194 NW2d 337 (1972). The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion. *People v Reinhardt*, 167 Mich App 584, 590, 423 NW2d 275 (1988).

Here, a review of the lower court record reveals that even though defense counsel urged defendant to take advantage of a plea bargain, after the trial court granted defendant's motion to withdraw his plea defense counsel represented defendant skillfully. Ultimately, defendant acknowledged that his attorney did not say he had to plead guilty. Defendant presents no evidence that once the case went to trial, he and his attorney had a difference of opinion regarding a fundamental trial tactic. In fact, although defendant was charged with first-degree child abuse, his attorney presented evidence that convinced the jury that defendant was guilty of the lesser charge of second-degree child abuse.

Furthermore, the record indicates that this was defendant's second court appointed attorney and the second time he had withdrawn a plea. A substitution where defense counsel maintained that his relationship with his client was good would have unreasonably disrupted the judicial process. In short, we conclude that the trial court did not abuse its discretion in denying defendant's requests for substitute counsel.

B. Jury Instructions

Defendant also argues that the trial court's failure, during jury instruction on second-degree child abuse, to define "recklessness" constituted plain error affecting defendant's substantial rights. We disagree.

A trial judge must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, jury instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.*

In *People v Allen* 466 Mich 86, 87; 643 NW2d 227 (2002), the trial court instructed the jury that it must find defendant guilty beyond a reasonable doubt but it failed to give further instruction defining reasonable doubt. Our Supreme Court held that the concept of reasonable doubt is within the common understanding of jurors. It concluded that a court's failure to define the phrase "reasonable doubt" is not a plain error requiring reversal of a defendant's conviction.

Furthermore, in *People v Gregg* 206 Mich App 208, 520 NW2d 690 (1994), this Court found that the term "reckless" in the fourth-degree child abuse statute had plain and ordinary meaning that was understandable to the jury. It concluded that the statute was not unconstitutional on the ground that it conferred on the trier of fact unstructured and unlimited

discretion to determine whether offense had been committed, despite the fact that "reckless" was not defined in statute.

Similarly, in this case, the term “reckless” is within the common understanding of jurors. Defendant argues that the term “reckless” requires further definition because in the instruction for the offenses of abuse of vulnerable adult, second degree, CJI2d 17.31 and abuse of vulnerable adult, fourth degree, CJI2d 17.33 the term “reckless” is defined. For purposes of vulnerable adult abuse, MCL 750.145m(p) defines “reckless act or reckless failure to act means conduct that demonstrates a deliberate disregard of the likelihood that the natural tendency of the act or failure to act is to cause physical harm, serious physical harm, or serious mental harm.”

The vulnerable adult abuse statute, MCL 750.145m(p), can be distinguished from the second-degree child abuse statute, MCL 750. 136b(3), because, vulnerable adult abuse requires either a “reckless act” or a “reckless failure to act,” whereas the second-degree child abuse statute contains only the “reckless act” language. The term “reckless act” is commonly understood, but a “reckless failure to act” is a more complex legal concept that requires more instruction for a lay jury. Thus, defendant’s argument is unpersuasive and defendant has failed to establish that plain error occurred.

Affirmed.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Bill Schuette